

Needham (Migration) [2017] AATA 2495 (24 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Neville Gordon Needham
VISA APPLICANT:	Ms Chantheng Thung
CASE NUMBER:	1617592
DIBP REFERENCE(S):	BCC2016/301560
MEMBER:	Maira Brophy
DATE:	24 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa.

Statement made on 24 November 2017 at 9:44am

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – Genuinely intend to marry and live together – Inconsistent evidence – Limited knowledge of each other's family circumstances – Sponsoring spouse provides monetary assistance to visa applicant

LEGISLATION

Migration Act 1958 ss 5F, 5F(2)(a)-(d), 65, 359AA

Migration Regulations 1994 rr 1.15A(3), 1.15A(4), Schedule 2 cls 300.211, 300.212, 300.213, 300.214, 300.215, 300.215(a)-(b), 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 20 January 2016. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on 6 October 2016 on the basis that the visa applicant did not satisfy cl.300.216 of Schedule 2 to the Regulations because the delegate was not satisfied the parties genuinely intended to live together in a genuine and continuing relationship.
4. The review applicant, Mr Neville Gordon Needham appeared before the Tribunal on 6 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant Ms Chantheng Thung and from Mr Ronny Suvon and Ms Lay Suvon. The Tribunal hearing was conducted with the assistance of an interpreter in the Khmer and English languages.
5. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Background

7. The review applicant, Mr Neville Gordon Needham is a 63 year old Australian citizen. He has declared one previous marriage that ended in divorce in November 1980. There are two sons of that relationship, both living in Australia. His parents are deceased; he has two brothers and one sister in Australia.
8. The visa applicant, Ms Chantheng Thung is a 37 year old living in Cambodia. She has declared no previous relationships. Her mother is deceased and her father and two brothers reside in Cambodia.
9. The parties stated that they met each other via telephone having been introduced by the aunt of the visa applicant. The sponsor travelled to Cambodia on 22 December 2014 and on 24 December 2014 a dinner was held with the visa applicant's family to announce their engagement.
10. The application was lodged on 20 January 2016.
11. The visa applicant was interviewed by a delegate on 25 August 2016.

12. In the Decision Record a copy of which has been provided to the Tribunal the delegate noted the parties had only limited knowledge of each other's circumstances and they provided inconsistent information as to the progression of the relationship.
13. Prior to hearing the sponsor provided additional documents to the Tribunal including but not limited to: statutory declaration (form 888), submission from the migration agent, evidence of communication between the parties, affidavit of visa applicant, statutory declaration of the review applicant, invoices and flight itineraries for the review applicant's trips to Cambodia, details of joint account in Cambodia, decision record on visa applicant's application for a visitor visa.
14. On 21 November 2017 the Tribunal was advised the review applicant was intending to travel to Cambodia on 2 December 2017 and to return to Australia on 1 January 2018. A copy of his flight details was attached to the advice.

Tribunal Proceedings

15. The issue in the present case is whether the visa applicant, Ms Chantheng Thung and her sponsor Mr Neville Gordon Needham genuinely intend to marry and live together in a spousal relationship, both at the time of application and at the time of this decision.
16. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant, visa applicant and the witness at the hearing.
17. There were a number of inconsistencies in the parties' oral evidence and these were put to the review applicant in writing after the hearing in accordance with section 359AA of the Act. The Tribunal explained the relevance and the consequences of relying on that information. The discrepancies were as follows:
 - The visa applicant said the review applicant had one daughter. The review applicant said he had two sons.
 - The visa applicant said the review applicant did not have any brothers and sisters. The review applicant said he had three sisters and two brothers.
 - The visa applicant said the review applicant earned \$200 per day. The review applicant said he was in receipt of a disability support pension from Centrelink. He had some earnings that were seasonal. In those months he worked, he earned around \$2000 to \$3000 per month.
 - The visa applicant said she lives with Nut Moy and her married cousin. The review applicant said the visa applicant lives with Nut Moy, her brother and his wife and their two year old daughter.
 - The visa applicant told the Tribunal Nut Moy was her father's sister and Layheang was not a blood relative. The review applicant said Nut Moy was related to Layheang who is married to his friend Ronnie.
 - The visa applicant said the review applicant had visited for one week in April and before that he had visited in January for three weeks. The review applicant said he had last visited Cambodia for two weeks in April 2017 and before that in January he had visited for two months.

18. Submissions as to the inconsistencies in the oral evidence and additional evidence were received by the Tribunal on 20 September 2017. Those submissions have been taken into account when making a decision and where relevant those submissions will be referred to in the reasons below.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The Tribunal is satisfied that Mr Needham is not prohibited by subclause (2) of cl.300.212 from being a sponsor and is over the age of 18 years. The Tribunal finds that at the time of application Ms Thung was sponsored by Mr Needham. There is no dispute and the Tribunal finds that the parties have met and are known to each other personally. Therefore, the requirements of cl.300.212, cl.300.213 and cl.300.214 are met. Consequently, the Tribunal must determine whether Ms Thung and Mr Needham genuinely intend to marry and live together in a spouse relationship, both at the time of application and at the time of this decision.

Does Ms Thung intend to marry an eligible person?

20. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Mr Needham is an Australian citizen.
21. The Tribunal accepts that at the time of application Ms Thung intends to marry Mr Needham who is an Australian citizen. Accordingly, the Tribunal finds that the requirements of cl.300.211 are met.

Do the parties genuinely intend to marry?

22. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The parties gave evidence of their intention to marry after the visa applicant gets permission to come to Australia. The parties gave consistent oral evidence they would marry soon after the visa applicant arriving in Australia. The review applicant said the parties would be married in a civil ceremony at a Registry Office. The review applicant said his sister would attend and the visa applicant said Nut Moy and her cousin would attend.
23. At the time of application the parties had a genuine intention to marry and satisfy the requirements of cl.300.215 (a). The proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore, the requirements of cl.300.215 met.

DO THE PARTIES GENUINELY INTEND TO LIVE TOGETHER?

24. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.

25. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.
26. The parties do not have any joint assets, liabilities or bank accounts.
27. There is limited evidence to indicate that they have ever pooled their financial resources or shared household expenses. Mr Needham provides monetary assistance to the visa applicant when he is in Cambodia as he stays with her and her family.
28. Mr Needham and Ms Thung do not have any joint responsibility for the care and support of children.
29. The Tribunal has concerns about the rapid inception of the parties' relationship and their decision to marry after spending so little time in each other's company. The Tribunal accepts on the history given by the parties that they first made contact via telephone. The review applicant travelled to Cambodia on 22 December 2014 and the parties decided to marry and held an engagement ceremony on 24 December 2014.
30. There is evidence to support that Mr Needham and Ms Thung have maintained contact after they met in 2014, and that they are in regular communication in so much as they are able given the language difficulties.
31. There is little independent evidence to indicate that the parties' relationship is recognised socially by family, friends and the wider community in Cambodia. A statutory declaration made by Ms Julie-Anne Vucemille dated 4 September 2017 attested to the fact she knew the review applicant well as his sister. She had not met the visa applicant so she had not seen the parties together so was unable to make observations on that basis. She said she believed the review applicant wanted to marry and he is emotionally attached to his fiancée. She said the family would support their union and she did not see the language barrier as an issue. At the time of application two statutory declarations were provided. A statutory declaration from Mr Phou Saroun, dated 21 December 2015 attested to the fact he had known the visa applicant for 20 years and that he was friends with the review applicant. In his opinion the relationship was genuine. A further statutory declaration from Lay Heang Chhorn dated 21 December 2015 attested to the fact she had known the visa applicant for 25+ years and the review applicant for four years. In her opinion the parties genuinely cared about each other.
32. The Tribunal was mindful that none of these statements made informed observations as to how the parties interacted when they were together. There were no statements from persons in Cambodia who had observed the parties when they were together.
33. At the hearing the visa applicant demonstrated a limited understanding of the review applicant's circumstances. Ms Thung was vague about the details of Mr Needham's family. For example, she did not know he had brothers and sisters. The Tribunal would have expected her to know these details.
34. The visa applicant gave conflicting evidence about the review applicant's family, what he earned and the amount of time he had spent with her. The review applicant gave conflicting evidence about the relationship with the persons she lived with. Those inconsistencies were put to the review applicant at the conclusion of the hearing in accordance with the requirements of section 359AA and the Tribunal has considered the explanations provided. While the passage of time may dim some recollections of events, the Tribunal is of the view that when as in this case the parties do not reside in the same country, details of significant events and relationships are things you would remember with some specificity. Whilst it is

appreciated the separation has been very difficult for the parties and this stress can of itself lead to some inconsistencies in the evidence given, the Tribunal is not satisfied the explanations given are sufficient to overcome cumulative effect of the inconsistencies. Where there is a conflict between the explanations given and the evidence at the time of hearing the Tribunal prefers the evidence given at hearing as being the more reliable.

35. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the parties as being indicative of a relationship between parties who intend to share a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would. The Tribunal considers that there is little independent evidence that the parties provide each other with companionship and emotional support such as might be expected of a couple in a prospective spousal relationship.
36. The Tribunal was not satisfied on the basis of the evidence before it that at the time of application, or at the time of decision, Mr Needham and Ms Thung genuinely intended to live as spouses. Ms Thung therefore does not meet cl.300.216 and cl.300.221.
37. For the reasons above, the Tribunal finds Ms Thung does not satisfy the criteria for the grant of the visa.

DECISION

38. The Tribunal affirms the decision not to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa.

Moir Brophy
Member